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No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC. AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN,
AND ALLAIN L. THIBODEAU,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act expressly preempts state-law claims that a cigarette company violated Maine's generally applicable prohibition on deceptive practices by falsely representing its cigarettes using the descriptors "light" and/or "lowered tar and nicotine."

2. Whether respondents' state-law claims based on the fraudulent use of such descriptors are impliedly preempted notwithstanding that the Federal Trade Commission has never authorized, encouraged, or required the use of such descriptors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 2

1. The Labeling Act 2
2. The FTC And Tar And Nicotine Yields 4
3. RICO Action Against Philip Morris 6
4. Proceedings Below 8

SUMMARY OF ARGUMENT 12

ARGUMENT 17

I. THE LABELING ACT DOES NOT PREEMPT RESPONDENTS' FRAUD CLAIMS 17

A. Under This Court's Precedent, Respondents' Fraud Claims Are Not Preempted 17

1. *Cipollone* held that fraud claims based on generally applicable state laws are not preempted 17

2. *Reilly* reaffirmed *Cipollone*'s distinction between state laws aimed at cigarette marketing and state laws of general applicability 19

3. Because respondents' claims are based on violations of a generally applicable state-law duty not to deceive, they are not preempted 20

4. Philip Morris's alternative reading of *Cipollone* is unpersuasive 21

B. There Is No Reason For This Court To Reexamine *Cipollone* 25

C. *Cipollone* And *Reilly* Correctly Interpreted The Labeling Act 28

1. Congress did not preempt state-law fraud claims 28

2. The Labeling Act cannot sensibly be read to invest in the FTC exclusive authority to police deceptive advertising 33

3. Philip Morris's expansive reading of the preemption provision is untenable 38

II. RESPONDENTS' FRAUD CLAIMS ARE NOT IMPLIEDLY PREEMPTED 44

A. The FTC Has Neither Authorized Nor Encouraged The Use Of Light Descriptors 45

B. The FTC Has Not Required The Use Of The Cambridge Method Or The Disclosure Of Tar And Nicotine Yields 54

CONCLUSION 57

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 29

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 43

American Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985) 37

Aspinall v. Philip Morris Cos., No. Civ. A. 98-6002, 2006 WL 2971490 (Mass. Super. Ct. Aug. 9, 2006) 52

Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) 41

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 13, 29, 30, 38, 40

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 30

Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383 (5th Cir. 2007) 25, 26

California v. ARC Am. Corp., 490 U.S. 93 (1989) 30

CBOCS West, Inc. v. Humphries, No. 06-1431 (U.S. May 27, 2008) 27

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 54

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 2, 4, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 39, 42, 56

City of New York v. FCC, 486 U.S. 57 (1988).....53, 54

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 30

Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) 25, 33

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) 4, 5, 6, 55

FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959) 50

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 15, 47, 56

Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973)..... 37

John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008) 26

Katharine Gibbs Sch. v. FTC, 612 F.2d 658 (2d Cir. 1979) 40

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 2, 4, 12, 13, 19, 20, 21, 27, 28, 42, 43

Marks v. United States, 430 U.S. 188 (1977)..... 18

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....32, 38

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 29

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 42, 43, 44

Panetti v. Quarterman, 127 S. Ct. 2842 (2007)..... 18

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 26, 28

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988)..... 33

Randall v. Sorrell, 548 U.S. 230 (2006) 27

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) 13, 28, 44

Rowe v. New Hampshire Motor Transp. Ass'n, 128 S. Ct. 989 (2008) 44

Safeco Ins. Co. v. Burr, 127 S. Ct. 2201 (2007)..... 43

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 38

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 37, 40, 48, 53

Tafflin v. Levitt, 493 U.S. 455 (1990)..... 32

United States v. Armour & Co., 402 U.S. 673 (1971) 50

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) 49, 50

United States v. Philip Morris Inc., 263 F. Supp. 2d 72 (D.D.C. 2003)..... 34

United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1 (2006), *clarified*, 477 F. Supp. 2d 191 (D.D.C. 2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.) 8, 46

United States v. Pritchett, 470 F.2d 455 (D.C. Cir. 1972)..... 29

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 29

Watson v. Philip Morris Cos., 127 S. Ct. 2301 (2007) 56

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 30

ADMINISTRATIVE DECISIONS

In re Beatrice Foods Co., 86 F.T.C. 1 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) 51

In re Berger, 56 F.T.C. 1000 (ALJ decision, adopted as modified by full Commission 1960)..... 51

In re Chrysler Corp., 87 F.T.C. 719 (ALJ decision 1975, adopted as modified by full Commission 1976) 50, 51

In re Ed Hamilton Furs, Inc., 51 F.T.C. 186 (1954) 50

In re Federal Employees' Distrib. Co., 56 F.T.C. 550 (ALJ decision, adopted by full Commission 1959)..... 51

In re Lorillard, 80 F.T.C. 455 (1972)..... 51

In re Trans Union Corp., 118 F.T.C. 821 (ALJ decision 1993, affirmed as modified by full Commission 1994) 51

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. art. VI, cl. 2 (Supremacy Clause)..... 53

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* 54

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.....42, 43, 44

Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) 1, 2, 3, 4, 14, 32, 41

§ 2(1), 79 Stat. 282 (15 U.S.C. § 1331(1) (Supp. I 1965)) 2

§ 4, 79 Stat. 283 (15 U.S.C. § 1333 (Supp. I 1965)) 2

§ 5(a), 79 Stat. 283 (15 U.S.C. § 1334(a))..... 2

§ 5(b), 79 Stat. 28 (15 U.S.C. § 1334(b) (Supp. I 1965)) 2

Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* 4, 14, 15, 48

15 U.S.C. § 45(a)(1)-(2) 4

15 U.S.C. § 45(m)(1)(B) (1988) 48

15 U.S.C. § 45(m)(1)(B) 49

15 U.S.C. § 55(a) 22

15 U.S.C. § 57a(a)(1)(B)..... 4, 45

15 U.S.C. § 57a(b)-(d) 54

15 U.S.C. § 57b 37

15 U.S.C. § 57b(e) 49

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) 3, 4, 14, 18, 32, 35, 36, 37, 41

§ 2, 84 Stat. 87-90:

84 Stat. 87, 15 U.S.C. § 1331(2)..... 38

84 Stat. 88:

15 U.S.C. § 1333 (1970) 3

15 U.S.C. § 1334(b) 4, 12, 13, 15, 17, 19, 21, 26, 28, 29, 30, 32, 42

84 Stat. 89:

15 U.S.C. § 1335..... 3, 32

15 U.S.C. § 1336(a) (1970)..... 3

15 U.S.C. § 1336(b) (1970)..... 3

15 U.S.C. § 1336(c) (1970) 4, 35

12 U.S.C. § 2259..... 42

17 U.S.C. § 301(a) 42

25 U.S.C. § 1723(a)(1)..... 42

25 U.S.C. § 1753(d) 42

29 U.S.C. § 1144(a) 42

29 U.S.C. § 1144(c)(1) 42

Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 205-A *et seq.* 8, 20

§ 207..... 8, 20

16 C.F.R.:

Pt. 0:

§ 0.4..... 35

Pt. 408..... 45

Pts. 408-460 45

LEGISLATIVE MATERIALS

Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the S. Comm. on Commerce, 91st Cong. (1969) 31

Cigarette Labeling and Advertising: Hearings Before the S. Comm. on Commerce, 89th Cong. (1965) 35

Cigarette Labeling and Advertising — 1969 (Part 1): Hearings Before the H. Comm. on Interstate and Foreign Commerce, 91st Cong. (1969) 31

H.R. Rep. No. 89-449 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2350 ..... 3, 38

H.R. Rep. No. 103-138 (1993) 49

S. Rep. No. 89-195 (1965) 3

S. Rep. No. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652 .....14, 32

S. Rep. No. 93-151 (1973) 37

ADMINISTRATIVE MATERIALS

Comments of Philip Morris Inc., *et al.*, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998), *available at* http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf..... 6, 46

FTC, *Operating Manual*, *available at* http://www.ftc.gov/foia/ch08industryguidance.pdf..... 54

Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed. Reg. 12,671 (1970) 5-6

OTHER MATERIALS

Brief for the United States as Amicus Curiae, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Dec. 15, 2006) 47, 55, 56

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Thomas M. Dyer & James B. Ellis, *The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. Wash. L. Rev. 330 (1972) 35, 36

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Stephanie W. Kanwit, *Federal Trade Commission* (2006) 34, 35, 36, 37

Earl W. Kintner & Christopher Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 Mercer L. Rev. 651 (1975) 36

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Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439 (1964) 36-37

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National Inst. of Health, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* (Aug. 1996) 5

Proof Brief for the United States of America, *United States v. Philip Morris USA Inc.*, Nos. 06-5267 *et al.* (D.C. Cir. filed Nov. 19, 2007) 7

Restatement (Second) of Torts (1977) 22

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1 (2005) 34

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For decades, Philip Morris has knowingly and falsely represented that certain brands of its cigarettes are "light" or have "lowered tar and nicotine," even while designing its cigarettes to ensure that smokers would not receive reduced levels of tar or nicotine. Respondents' claims challenging that conduct arise under Maine's generally applicable unfair-and-deceptive-trade-practices statute and are based on factual allegations substantially similar to those brought by the United States against Philip Morris and other cigarette companies. Unlike the government's case, respondents' claims seek remedies under state law for economic harms caused by Philip Morris's fraud.

Respondents' claims are not preempted by federal law. This Court has already held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act") does not preempt generally applicable state-law duties not to deceive (such as the Maine statute at issue), where the claims are unrelated to the warning labels on packages. The Labeling Act preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies. That holding follows from the text, history, and purposes of the Labeling Act, which show that Congress did not intend to create a cigarette-industry exemption from general state-law duties not to deceive.

Nor are respondents' claims impliedly preempted by Federal Trade Commission ("FTC") actions regarding tar and nicotine yields. The FTC has never authorized, encouraged, or required Philip Morris to use light descriptors — including as a shorthand for tar and nicotine yields — let alone to use descriptors fraudulently.

STATEMENT

1. The Labeling Act

In 1964, the Surgeon General of the United States issued a "bellwether publication" concluding that cigarette smoking was a public health hazard. JA718a; *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001). Congress responded in 1965 by enacting the Federal Cigarette Labeling and Advertising Act ("1965 Act"). The statute's primary purpose was to ensure that "the public may be adequately informed that cigarette smoking may be hazardous to health." 1965 Act § 2(1), 79 Stat. 282. The 1965 Act, however, imposed only minimal requirements on cigarette companies: it provided that each package of cigarettes must bear a warning label that smoking "may" be a health hazard. *See id.* § 4, 79 Stat. 283. The Act did not regulate cigarette advertising.

Because the FTC and several States were poised to adopt regulations requiring other warning labels on cigarette packages, *Cipollone*, 505 U.S. at 513, the 1965 Act included a preemption provision stating that "[n]o statement relating to smoking and health, other than the statement required by ... this Act, shall be required on any cigarette package." 1965 Act § 5(a), 79 Stat. 283. A second part of that provision stated that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with provisions of this Act." *Id.* § 5(b), 79 Stat. 283. Those provisions addressed cigarette companies' concerns that States or the FTC would impose conflicting labeling requirements or would dictate special regulatory burdens targeted specifically

at cigarette companies' advertising. *See* H.R. Rep. No. 89-449, at 4, 9 (1965) ("1965 House Report"); S. Rep. No. 89-195, at 4 (1965). The 1965 Act was to sunset in 1969.

In April 1970, again in the face of proposed cigarette warning requirements by the FTC and some States, Congress enacted the Public Health Cigarette Smoking Act of 1969 ("1969 Act"). The 1969 Act reincorporated wholesale the statement of purpose of the 1965 Act, while slightly modifying other provisions. Congress strengthened the labeling requirement, changing the statement that cigarette smoking "may be hazardous" to "is dangerous." *See* 1969 Act § 2, 84 Stat. 88 (amending 1965 Act § 4). Congress also prohibited broadcast advertising of cigarettes after 1971. *See id.*, 84 Stat. 89 (adding new 1965 Act § 6). But rather than prohibiting the FTC from adopting regulations targeted at cigarette advertising, as it had done in the 1965 Act, Congress prohibited the FTC from "tak[ing] any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising." *Id.* (adding new 1965 Act § 7(a)). After 1971, Congress required the FTC to submit any cigarette rules to Congress six months before they could take effect. *Id.*

Congress made clear that this restriction on the FTC's ability to adopt targeted cigarette regulations did not "limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." *Id.* (adding new 1965 Act § 7(b)). Moreover, although there was substantial doubt at the time whether the FTC had statutory authority to regulate cigarette companies at all through rulemaking as

opposed to adjudication, Congress took no position on the issue, expressly refusing to "affirm or deny the [FTC's] holding that it has the authority to issue trade regulation rules." *Id.* (adding new 1965 Act § 7(c)).

Congress modified the preemption provision to specify that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with [the 1965] Act." 1969 Act § 2, 84 Stat. 88 (amending 1965 Act § 5(b)). "The new subsection (b) did not pre-empt regulation by federal agencies, freeing the FTC to impose warning requirements in cigarette advertising." *Reilly*, 533 U.S. at 544 (citing *Cipollone*, 505 U.S. at 515). Like the 1965 Act, the 1969 Act contained no provisions regulating false or deceptive advertising by cigarette companies.

2. The FTC And Tar And Nicotine Yields

The Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce," directs the FTC to prevent persons from engaging in such acts or practices, and authorizes the FTC to prescribe rules to "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. §§ 45(a)(1)-(2), 57a(a)(1)(B). Although the FTC's rulemaking authority extends to the marketing and sale of cigarettes, no FTC regulations govern the cigarette industry.

In the 1950s, the FTC began investigating inaccuracies in cigarette advertising about tar and nicotine. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). That inquiry was triggered by the industry's new advertising emphasis: "In response to the emerging scientific evidence that

cigarette smoking posed a significant health risk to the user, ... major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers" about the health effects of smoking. National Inst. of Health, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes*, at iii (Aug. 1996). This new campaign reflected Philip Morris's decision to promote the image of a healthier cigarette (regardless of its basis in fact), to stem the inevitable economic losses that would follow as smokers quit smoking because of health concerns. *See* JA843a, 857a.

By the mid-1960s, "the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine." *Brown & Williamson*, 778 F.2d at 37. In 1966, the FTC sent letters to cigarette manufacturers explaining that factual statements regarding tar and nicotine content, if based on the "Cambridge Filter Method," would not be deemed deceptive so long as there were no express or implied representations that the levels of tar and nicotine reduced or eliminated health hazards. *See* JA478a. The Cambridge Method is a means of measuring the tar and nicotine that "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." *Brown & Williamson*, 778 F.2d at 37.

In 1970, the FTC sought comment on a formal Trade Regulation Rule that would have made it "an unfair or deceptive act or practice ... to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of cigarettes]" as determined using the Cambridge Method. Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed.

Reg. 12,671, 12,671 (1970). The proposed rule did not address, or purport to concern, the use of descriptors such as "light" or "lowered tar." Later that year, five leading cigarette companies, including Philip Morris, voluntarily undertook to disclose in their advertising tar and nicotine data culled from FTC test results. *See* JA571a-572a. The FTC was not a party to that industry agreement. It subsequently suspended its rulemaking proceeding. *See Brown & Williamson*, 778 F.2d at 37.

In 1997, the FTC sought public comment on changes to the Cambridge Method. It also requested comment on whether to regulate light descriptors, explaining that it was "beginning the process" of examining such descriptors and that there are no "official definitions" for descriptors such as "low tar" and "light." JA291a-292a. Cigarette companies, including Philip Morris, filed joint comments with the FTC stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998) ("Philip Morris 1998 FTC Comments"), *available at* http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf. The FTC took no action to promulgate a rule governing descriptors. In 2002, Philip Morris changed course and urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." JA1083a-1084a.

3. RICO Action Against Philip Morris

In 1999, the United States brought an action under the Racketeer Influenced and Corrupt Organization Act ("RICO") against Philip Morris and eight other

cigarette companies. The United States alleged that the cigarette companies "engaged in a decades long conspiracy to deceive the American public" about the health effects of cigarettes and that "they did so to retain and extend the mass market for their product." U.S. Br. at 2, *United States v. Philip Morris USA Inc.*, Nos. 06-5267 *et al.* (D.C. Cir. filed Nov. 19, 2007).

A central aspect of the United States' case against the cigarette companies (including Philip Morris) is that their use of light descriptors on cigarette packages and in advertising is fraudulent. The United States marshaled evidence that Philip Morris developed light cigarettes "to introduce a 'socially acceptable cigarette' that would 'be a welcomed alternative to quitting.'" *Id.* at 53. The United States charged that Philip Morris marketed its "low tar/light brands" to provide "'health reassurance[s]'" to consumers. *Id.* at 54. Those reassurances, the United States has proven at trial, are false: the "marketing of so-called 'light' cigarettes is a principal weapon in [cigarette companies'] attempts to mislead the public regarding the health risks of smoking." *Id.* at 146. In that litigation, moreover, Philip Morris argued that the RICO action was preempted as it sought to impose liability based on the FTC's supposed endorsement of descriptors. The government successfully rebutted that position by relying on, among other things, testimony of the FTC that it "does not have a view on the use of descriptors ... on cigarette packages or in cigarette advertising." JA462a.

After a nine-month bench trial, the district court entered a final judgment on August 17, 2006, making more than 4,000 factual findings and citing "overwhelming evidence" that the cigarette companies

engaged in a conspiracy to deceive the public. *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 27 (2006), *clarified on other grounds*, 477 F. Supp. 2d 191 (D.D.C. 2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.). The court found that Philip Morris and others "have marketed and promoted their low tar brands as being less harmful than conventional cigarettes," but "[t]hat claim is false." *Id.* at 430. In support, the court pointed to internal industry documents from the 1960s and 1970s demonstrating that cigarette companies knew that "low tar cigarettes do not actually deliver the low levels of tar and nicotine which are advertised," and thus that the cigarettes would not "provide any clear health benefit to human smokers." *Id.* at 431; *see id.* at 456-58, 461-67, 477-81, 488-92, 513-29 (reciting evidence specific to Philip Morris). (Such evidence is abundant in this record as well. *See* JA703a-704a, 843a-844a, 851a.)

4. Proceedings Below

a. Respondents, on behalf of themselves and a class of all similarly situated Maine consumers, brought suit in federal district court against Philip Morris USA Inc. and its parent company under Maine's Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 205-A *et seq.* ("MUTPA"), which prohibits "deceptive acts or practices in the conduct of any trade or commerce," Br. App. 6a.

Respondents' allegations are substantially similar to those that the United States has made against Philip Morris. The complaint alleges that, prior to 1971, Philip Morris recognized that smokers had become concerned about the health consequences of smoking, a development that posed a threat to Philip Morris's profits. *See* JA28a. In that context, beginning in 1971, Philip Morris designed and manufac-

tured a brand of cigarettes known as Marlboro Lights. Each package of Marlboro Lights sold by Philip Morris since 1971 bore the descriptors "Lights" and "Lowered Tar and Nicotine." *Id.* Respondents alleged that Philip Morris used these light descriptors "with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes." *Id.* (Respondents made similar allegations with respect to Cambridge Lights. *See* JA28a-29a.)

Respondents allege that Philip Morris knew that this message was "[f]alse[]." JA38a. Philip Morris knew that light cigarettes would not "deliver[] lowered tar and nicotine in comparison to regular cigarettes." JA32a. Philip Morris understood, based on "extensive research" conducted prior to launching its line of light cigarettes, JA31a, that smokers would compensate for reduced tar and nicotine levels through various "unconscious acts," with the result that they would receive "100% of the tar and nicotine that would be received by the smoker from the regular cigarette." JA30a. Indeed, Philip Morris "[i]ntentionally manipulat[ed] the design and content" of its light cigarettes "to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine." JA32a. Through this conduct Philip Morris "[f]alsely ... represent[ed]" that its product was light, lower in tar and nicotine, and safer than full-flavored cigarettes. *Id.* Those representations violate Maine's proscription on deceptive acts. *See* JA37a-39a.

Philip Morris moved for summary judgment, arguing, as relevant here, that respondents' claims were expressly preempted by the Labeling Act and impliedly preempted by the FTC's supposed approval of

Philip Morris's use of light descriptors. The district court granted the motion for summary judgment on the ground that respondents' claims were expressly preempted. *See* Pet. App. 103a-106a.

b. The First Circuit reversed. The court applied this Court's decision in *Cipollone*, noting that "[m]ost lower courts have ... treated the plurality opinion as controlling, as have the parties here, both on appeal and in the district court." Pet. App. 15a (citation omitted). The court stated that "[t]he parties agree that whether the [Labeling Act] expressly preempts [respondents'] claims depends on how best to categorize them by analogy to the ... causes of action considered in *Cipollone*." *Id.*

The court found that the "substance" of respondents' claims is that Philip Morris "falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'" *Id.* at 16a. Applying *Cipollone*, the court held that a fraud claim is not preempted "merely because it arises out of the adverse health consequences" of smoking; rather, the proper question is whether "'the legal duty that is the predicate'" of the claims is "'based on smoking and health.'" *Id.* at 18a (quoting 505 U.S. at 524). Because respondents' claims rest on a general duty under Maine law not to deceive consumers, they are not preempted under *Cipollone*. *See id.* at 20a-22a.

The First Circuit rejected the district court's holding that fraudulent-misrepresentation claims based on the use of "light" descriptors were preempted because "'Congress and the FTC never acted to restrict the tobacco companies from using these general descriptors.'" *Id.* at 24a. The court of appeals reasoned that, while the FTC's or Congress's failure to disapprove light descriptors may bear on implied

preemption, it has nothing to do with express preemption. *See id.* The First Circuit also rejected Philip Morris's argument that respondents have alleged only "'implied misrepresentations,'" which, in Philip Morris's view, constitute "preempted failure-to-warn or warning neutralization claims," rather than "'express' misrepresentations" that Philip Morris acknowledged would not be preempted. *Id.* at 23a-24a (emphasis omitted). The court saw no basis in *Cipollone* for "treat[ing] claims based on 'implied' as opposed to 'express' misrepresentations differently for purposes of [Labeling Act] preemption." *Id.* at 25a.

Turning to Philip Morris's implied preemption defense, the court found that, after the FTC suspended its rulemaking in 1971 following the cigarette companies' voluntary agreement, "the FTC has never issued a formal rule specifically defining which cigarette advertising practices violate the [FTC] Act and which do not." *Id.* at 46a. The absence of any formal action weighed against a finding of implied preemption. The court noted that the Solicitor General had recently "explain[ed] that the FTC 'has never promulgated definitions of terms such as "light" and "low tar"' and that its previous statements purporting to define them 'did not reflect an official regulatory position.'" *Id.* at 54a. On that record, the court could not discern "a coherent federal policy on low-tar claims" or any other FTC action that warranted preemption. *See id.* at 54a-55a.

SUMMARY OF ARGUMENT

I. The Labeling Act does not expressly preempt respondents' state-law fraud claims.

A. This Court held in *Cipollone* that § 1334(b) does not preempt state-law fraud claims unrelated to warning labels. The Court reaffirmed that holding in *Reilly*, explaining that, while § 1334(b) preempts "regulations targeting cigarette advertising," 533 U.S. at 549-50, it leaves "significant power" to States to adopt "[r]estrictions ... that apply to cigarettes on equal terms with other products," *id.* at 551-52.

Respondents' state-law fraud claims are predicated on a Maine statute that imposes a generally applicable duty not to deceive. Respondents allege that Philip Morris violated that duty by falsely depicting its product as "light" and having "lowered tar and nicotine." Because the duty not to deceive applies on equal terms to all products, respondents' claims are not preempted.

Philip Morris's alternative reading of *Cipollone* — under which only claims of express misrepresentation survive — is unconvincing. Fraud and misrepresentation claims do not distinguish between express and implied false messages, and not one word in *Cipollone* supports the view that only claims based on express misrepresentations escape preemption. In any event, respondents' complaint alleges express, affirmative misrepresentations by Philip Morris. Philip Morris used light descriptors to convey a direct message to consumers regarding both the relative heath risks and the tar and nicotine content of its light cigarettes. Philip Morris knew those messages were false.

B. There is no justification for this Court to reexamine *Cipollone*. The circuit split on which Philip

Morris sought certiorari turns on whether the FTC has expressly authorized Philip Morris's use of light descriptors. Because the FTC has never done so, this Court can resolve the circuit conflict on express preemption on that basis. Philip Morris has not carried the heavy burden of establishing that this Court should go further and reexamine *Cipollone*'s statutory holding.

C. *Cipollone* and *Reilly* correctly construed the Labeling Act.

1. Section 1334(b)'s text supports the conclusion that the Labeling Act does not preempt state-law fraud claims of general applicability. Although the term "requirement" encompasses state statutory and common-law duties, *see Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), the duty (and the elements of that duty) — and not its application by a jury to a set of facts — constitutes the "requirement," *see Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). Maine's generally applicable prohibition on consumer fraud is therefore not a "requirement ... based on smoking and health." Any perceived ambiguity in the Labeling Act would be resolved against Philip Morris's position, because the presumption against preemption would preclude an expansive reading of § 1334(b) given the States' profound interests in enforcing generally applicable laws relating to fraud.

The history and purposes of the Labeling Act confirm the text's plain meaning. Cigarette companies did not ask Congress for, and did not receive, a cigarette-industry exemption from generally applicable state-law duties. Congress, in fact, was careful *not* to impose the result that Philip Morris seeks by crafting a "narrowly phrased" preemption provision

to avoid broadly preempting "police regulations." S. Rep. No. 91-566, at 12 (1969) ("1969 Senate Report").

Furthermore, nothing in the Labeling Act evinces Congress's intent to give cigarette companies an immunity from state laws relating to false advertising. Neither the 1965 Act nor the 1969 Act regulates deceptive advertising by cigarette companies. Particularly given Congress's concern about the industry's false representations about cigarettes, it is untenable to suppose that Congress *sub silentio* created the broad immunity that Philip Morris asserts.

2. Philip Morris concedes that Congress did not intend to insulate cigarette companies from liability for fraud. Philip Morris instead erroneously maintains that Congress meant to preempt state laws of general applicability, leaving the task of policing false claims in advertising to the FTC exclusively.

First, Philip Morris's position cannot be reconciled with the uniquely interdependent relationship between the FTC's regulatory scheme and private state-law remedies. Starting in 1966, the FTC encouraged States to adopt deceptive-practices statutes (such as Maine's) to serve as adjuncts to FTC enforcement. That distinctive history of co-existence between state-law remedies and the FTC Act makes it implausible that Congress would have intended to invest exclusive authority in the FTC.

Second, in 1970, the FTC had only limited law-enforcement authority that was widely perceived to be inadequate to protect consumers from deceptive advertising and other harms. It is inconceivable that Congress intended to confer on so weak an agency the sole authority, to the exclusion of the States, to police the cigarette industry's advertising practices.

3. Philip Morris's broad reading of § 1334(b) is unpersuasive. The Labeling Act's subsidiary goal of uniformity does not trump its primary goal of ensuring that consumers receive "adequate information" regarding smoking. State-law fraud claims further that end. In addition, state deceptive-practices statutes are modeled on and follow the FTC Act, contributing to uniformity. If state-law claims were ever to undermine uniformity, the FTC would be well-positioned to preempt such claims through industry-wide regulation of light descriptors.

Nor does the structure of the Labeling Act support broad preemption. Each version of the Act focused on the warning label on cigarette packages, not false and deceptive advertising.

Finally, this Court's precedent does not establish that it is irrational to read the Labeling Act as leaving untouched general state-law duties not to deceive. Preemption decisions of this Court interpreting other statutes with different texts, histories, and purposes do not provide a reliable guide to interpreting the Labeling Act.

II. Respondents' state-law fraud claims are not impliedly preempted.

A. The FTC has never adopted a rule relating to light cigarettes, and has never authorized, encouraged, or required the use of light descriptors, a fact that the Solicitor General recently confirmed. The government's official position renders this case the opposite of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and makes clear that Philip Morris cannot prevail on its implied preemption defense.

Two FTC consent orders with other companies do not support Philip Morris's position. The text of the FTC Act, decisions of this Court, and the FTC's

longstanding practice make clear that FTC consent orders do not function as industry-wide standards. Besides, Philip Morris could not avail itself of the safe harbor supposedly created by those orders because it has never disclosed tar and nicotine yields on cigarette packages.

Nor does the FTC's 1967 letter to a broadcasting trade association establish that the agency made a regulatory choice to authorize and/or encourage the use of light descriptors. That letter did not even mention light descriptors, did not authorize representations regarding safety, required that any claims be fully substantiated, and does not represent an affirmative regulatory decision to promote descriptors. In all events, the letter bears no indicia of formal agency decision-making that would support a claim of federal preemption of state law.

B. Philip Morris's assertion that the FTC has required the use of the Cambridge Method and the disclosure of factual tar and nicotine yields is both factually incorrect and legally irrelevant. Respondents challenge neither the Cambridge Method nor factual statements of yields based on it. In any event, the FTC's longstanding position is that the FTC has never required use of the Cambridge Method or the disclosure of tar and nicotine yields.

ARGUMENT

I. THE LABELING ACT DOES NOT PREEMPT RESPONDENTS' FRAUD CLAIMS

A. Under This Court's Precedent, Respondents' Fraud Claims Are Not Preempted

1. *Cipollone* held that fraud claims based on generally applicable state laws are not preempted

In *Cipollone*, this Court held that § 1334(b) did not preempt state-law claims alleging fraudulent misrepresentation regarding the health effects of cigarettes when such claims are not based on the warning on cigarette labels. A plurality of four Justices concluded that § 1334(b) did not exempt cigarette companies from generally applicable state-law duties not to deceive consumers. "The central inquiry" in deciding whether a state law is "based on smoking and health," the plurality reasoned, is whether the "predicate" of "the legal duty" "constitutes a 'requirement or prohibition based on smoking and health.'" 505 U.S. at 523-24. Applying that principle to the "intentional fraud and misrepresentation" claims before it, the plurality found that such claims did not come within the scope of § 1334(b) because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive." *Id.* at 528-29.

The plurality's conclusion rested on four rationales. First, "in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* at 529. Second, having "explicitly reserved" the FTC's authority to police deceptive advertising, Congress indicated that it "intended the [preemption provision] to be construed narrowly, so as not to proscribe the

regulation of deceptive advertising." *Id.* Third, "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, non-uniform, and confusing' standards"; rather, they rest "on a single uniform standard: falsity." *Id.* Fourth, interpreting the 1969 Act to preempt fraud claims "would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27.

In a concurring opinion, Justice Blackmun, joined by Justices Kennedy and Souter, concluded more broadly that the 1969 Act does not "provide[] the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims." *Id.* at 531. They were "unwilling to believe that Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct." *Id.* at 542.

Because the plurality's conclusion — that the 1969 Act does not preempt state-law fraud claims unrelated to warning labels — is a "narrow[er] ground[]" than the rationale of the concurring Justices — that the 1969 Act does not preempt any state-law damages claims — "the holding of [this] Court" in *Cipollone* is that the Labeling Act did not extinguish such state-law fraud claims. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted); *see Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007) ("[w]hen there is no majority opinion, the narrower holding controls" and constitutes "clearly established law") (internal quotations omitted).

2. *Reilly* reaffirmed *Cipollone*'s distinction between state laws aimed at cigarette marketing and state laws of general applicability

Reilly involved a preemption challenge to "comprehensive [state] regulations governing the advertising and sale of cigarettes." 533 U.S. at 532. This Court held that those cigarette-specific regulations fell within the scope of § 1334(b) because "the regulations expressly target cigarette advertising." *Id.* at 547. In response to criticism that its holding would "displace state regulation of the location of cigarette advertising," the Court explained that "[t]here is a critical distinction ... between generally applicable ... regulations ... and regulations *targeting* cigarette advertising." *Id.* at 549-50 (emphasis added). Targeted regulation, the Court said, "squarely contradicts the [Labeling Act]." *Id.* at 550. "States remain free," however, "to enact generally applicable ... regulations." *Id.*

The Court grounded that distinction in the purpose of § 1334(b): to protect cigarette companies from discriminatory state legal duties inapplicable to other commercial actors. The Court explained that, although § 1334(b) prevents States from adopting "special requirements or prohibitions" applicable only to cigarette companies, the provision's language "leaves significant power in the hands of States to impose generally applicable ... regulations." *Id.* at 551. "Restrictions ... that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision." *Id.* at 551-52. Congress, the Court said, did not intend to afford "cigarette advertisers" "special treatment" by

creating a broad cigarette-company exemption from "general [state] regulations." *Id.* at 551.

3. Because respondents' claims are based on violations of a generally applicable state-law duty not to deceive, they are not preempted

Respondents allege that Philip Morris violated Maine's generally applicable statutory prohibition against deceptive acts by all trade and commercial actors. The MUTPA provides broadly that "deceptive acts or practices in the conduct of any trade or commerce are ... unlawful." Br. App. 6a. Respondents allege that Philip Morris violated that generally applicable duty by "intentionally market[ing]" light cigarettes as "less harmful or safer" and lower in tar and nicotine "than regular" cigarettes through the use of descriptors "Lights" and "Lowered Tar and Nicotine." JA28a-29a. Those representations were false: Philip Morris "knew that ... the consumer would receive the same delivery of tar and nicotine from the 'lights' as from regular cigarettes," JA30a, and that such cigarettes were not "less harmful or safer" than regular cigarettes, JA29a. Respondents' claims, moreover, have nothing to do with the warning label on cigarette packages.

Respondents' fraud claims fit comfortably within the category of state-law fraud claims that, under *Cipollone* and *Reilly*, are outside the Labeling Act's preemptive reach. Indeed, respondents' fraud claims are indistinguishable from the "intentional fraud and misrepresentation" claims — which sought damages arising from lung cancer — in *Cipollone*. The claims here, like those in *Cipollone*, "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive."

505 U.S. at 528-29. A conclusion that Philip Morris is exempt from the duty not to deceive — a duty that Maine law applies equally to all commercial actors — would countermand *Reilly*'s teaching that Congress did not "intend[]" to "afford[]" "cigarette advertisers" a "special" exemption from "generally applicable ... restrictions." 533 U.S. at 551-52.[1]

4. Philip Morris's alternative reading of *Cipollone* is unpersuasive

To evade a straightforward application of *Cipollone* and *Reilly*, Philip Morris proposes an alternative reading of *Cipollone*, under which "it is inherent 'falsity' that distinguishes state-law requirements based on the 'duty not to deceive' from state-law requirements 'based on smoking and health.'" Br. 38-39. According to Philip Morris, the plurality meant to preempt state-law fraud claims based on statements "that might create a false impression," while preserving state-law fraud claims based on "inherently false statements." Br. 39. That argument is unavailing: *Cipollone* drew no distinction between inherently and potentially deceptive statements, so there is no support for Philip Morris's distinction; and, even if Philip Morris's notion of "inherent" deception were the governing standard, respondents' claims would readily satisfy it.

a. *Cipollone* provides no support for the distinction that Philip Morris seeks to draw. The plurality stated that the "central inquiry" under § 1334(b) is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'require-

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[1] Unlike the targeted advertising regulations in *Reilly*, Maine's proscription on fraud is not "intertwined with the concern about cigarette smoking and health." 533 U.S. at 548.

ment or prohibition based on smoking and health.'" 505 U.S. at 523-24. "[F]raudulent-misrepresentation" claims not related to warning labels are not preempted because those claims rest on "the duty not to deceive." *Id.* at 528-29. A duty not to deceive encompasses both express and implied, and both false and deceptive, representations. *See* Restatement (Second) of Torts § 526(c) (1977). As the court below explained, "[u]nder general principles of tort law, either an express or an implied statement can give rise to a claim for fraudulent misrepresentation." Pet. App. 25a. Even "[a] representation that the maker knows to be capable of two interpretations, one of which he knows to be false and the other true is fraudulent if it is made ... with the intention that it be understood in the sense in which it is false." Restatement (Second) of Torts § 527(a). False advertising laws accordingly have long made actionable statements that are neither literally nor necessarily false. *See, e.g.*, JA230a-231a (collecting cases); 15 U.S.C. § 55(a). Not one word in the *Cipollone* plurality suggests an intent to depart from that settled understanding of fraudulent and deceptive advertising claims.

b. Even if there were some basis for Philip Morris's theory, the supposed distinction between potentially and inherently false statements would not cause respondents' state-law fraud claims to be preempted because they satisfy Philip Morris's "inherent falsity" standard. Respondents allege that Philip Morris, knowing that light cigarettes were neither safer nor healthier than full-flavored cigarettes, nevertheless packaged its cigarettes using descriptors designed intentionally to express the "[f]alse[]" message (JA32a) that these cigarettes were, in fact, "less

harmful or safer" (JA28a, 29a). *See also* JA718a-719a. In addition, Philip Morris's representation that light cigarettes would deliver "lowered tar and nicotine in comparison to regular cigarettes" was false. JA32a. As the Monograph 13 Report prepared by the National Cancer Institute found, "[i]nternal tobacco company documents demonstrate that the cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as 'Light' or 'Ultra-Light.'" JA897a-898a. Light descriptors, in other words, expressly conveyed an inherently false message.

Philip Morris seeks to evade the inherent falsity of its messages by mischaracterizing respondents' claims as conceding "that descriptors are an accurate shorthand for conveying ... tar and nicotine testing results" using the Cambridge Method. Br. 40. Respondents do not allege that light descriptors were an FTC-approved "shorthand" for Cambridge Method results or that the descriptors conveyed to consumers *any* message regarding the Cambridge Method. Philip Morris used light descriptors to convey a message "that [light cigarettes] were less harmful or safer than regular ... cigarettes," JA28a, 29a, and that such cigarettes would "deliver[] lowered tar and nicotine in comparison to regular cigarettes," JA32a. Respondents allege that those messages were false, not potentially misleading.

To the extent Philip Morris's argument is that consumers understood light descriptors to denote Cambridge Method test results rather than messages about safety or health or tar and nicotine levels when smoked, that argument is premature. What consumers understood "light" (and other descriptors) to mean is a question of fact on which Philip Morris

has neither submitted evidence nor moved for summary judgment. *See* Pet. App. 34a (Philip Morris "did not seek summary judgment on" the ground that the descriptors "accura[tely]" convey Cambridge Method test results). It therefore cannot obtain preemption based on a factbound argument that the descriptors were actually understood by consumers as a "shorthand" for Cambridge Method results. *See*, *e.g.*, JA820a (what descriptors "mean to members of the public is an empirical question that can be revealed by careful survey research"), 828a ("Many consumers use [descriptors] as a guide to the riskiness of particular brands of cigarettes.").[2]

Philip Morris also argues that respondents' fraud claims are preempted under *Cipollone* because they constitute "warning-neutralization" claims. Br. 40-41. But the *Cipollone* plurality explained that a preempted warning-neutralization claim "is predicated on a state-law prohibition against statements" that "neutralize[] the effect of federally mandated warning labels." 505 U.S. at 527. Respondents' claims have nothing to do with the warning on cigarette packs. To treat all health-related fraud claims as warning-neutralization claims cannot be squared with *Cipollone*'s treatment of similar allegations and its conclusion that an "intentional fraud and misrepresentation" claim unrelated to warning labels is not preempted because "[t]he predicate of this claim is a state-law duty not to make false statements." *Id.* at

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[2] Indeed, given that the FTC has never defined descriptors (as evidenced by, among other things, official FTC testimony) and that Philip Morris has never disclosed yields or mentioned the Cambridge Method on cigarette packages, *see infra* p. 52, Philip Morris's position that descriptors are a shorthand for test results is difficult to take seriously.

528. As the court below correctly held, "[a]ccepting Philip Morris's argument ... would extend the preemptive reach of the [Labeling Act] to virtually all fraudulent misrepresentation claims," ignoring "*Cipollone*'s explicit holding that those claims survive preemption." Pet. App. 28a.[3]

B. There Is No Reason For This Court To Reexamine *Cipollone*

Philip Morris concludes its preemption discussion with a request to "reexamine" — and presumably overrule — *Cipollone*. Br. 43. That request should be rejected.

First, this Court can resolve the circuit split on which Philip Morris sought certiorari by deciding that the FTC has not approved the use of light descriptors. In its petition, Philip Morris relied entirely on the divide between the Fifth and First Circuits with respect to express preemption. *See* Pet. 10. The Fifth Circuit has held that, "[w]hile claims based on 'fraud by intentional misstatement' are not preempted" under *Cipollone*, "the use of FTC-approved descriptors cannot constitute fraud." *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 391-92 (5th Cir. 2007). The court reasoned that "[t]o hold that [cigarette companies'] use of the FTC-approved terms relating to the FTC-approved measurement system constitutes affirmative misstate-

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[3] Philip Morris's attempt (at 42-43 n.10) to manufacture a preemption defense by recharacterizing respondents' fraud claims as failure-to-warn claims likewise has no merit. Respondents have alleged that Philip Morris made affirmatively false claims, not that it breached a duty to provide consumers with more information. *See* JA38a; *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) (fraud is "based on a duty to tell the truth, not on a duty to warn").

ment" would undermine federal objectives. *Id.* at 392. The First Circuit, by contrast, correctly held that such analysis confuses express and implied preemption issues, and that the FTC has never sanctioned the use of light descriptors. *See* Pet. App. 24a.

The circuit split on which Philip Morris sought certiorari thus turns entirely on diverging understandings of the FTC's actions with respect to light cigarettes. Even Philip Morris's Question Presented rests on the premise that respondents are challenging "FTC-authorized statements." Br. i. Once this Court finds that the FTC has neither authorized nor encouraged the use of light descriptors by Philip Morris, the circuit split on express preemption is resolved. *See infra* pp. 45-54. There is no cause to go further and to reexamine *Cipollone*.

Second, and in any event, Philip Morris has not carried the heavy burden of establishing that *Cipollone*'s interpretation of § 1334(b) warrants reexamination. This Court "has said often and with great emphasis that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (internal quotations omitted). "*[S]tare decisis* in respect to statutory interpretation has 'special force,'" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008) (quoting *Patterson*, 491 U.S. at 172-73). Statutory precedent may be overruled only in extraordinary circumstances, where there has been an "intervening development of the law," where precedent serves as a "positive detriment to coherence," or where precedent, "tested by experience, has been found to be inconsistent with the sense of justice." *Patterson*, 491 U.S. at 173-74

(internal quotations omitted); *see Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality) ("the rule of law demands that adhering to our prior case law be the norm" such that "[d]eparture from precedent is exceptional, and requires 'special justification'").

Even if there were reason to question the correctness of *Cipollone*'s statutory interpretation — there is none, *see infra* pp. 28-44 — this Court's criteria would all weigh against reexamining the decision. In the 16 years since *Cipollone*, Congress has done nothing to call into question *Cipollone*'s central holding that cigarette companies have no exemption from state-law prohibitions against fraud. Nor have any decisions of this Court undermined the rationale of *Cipollone*. On the contrary, *Reilly* reaffirmed *Cipollone*'s core analytical framework. Revisiting *Cipollone* is especially inappropriate given that the arguments advanced by Philip Morris were apparent to the Court when it decided *Cipollone*. *See CBOCS West, Inc. v. Humphries*, No. 06-1431, at 10 (U.S. May 27, 2008) ("[I]t is too late in the day in effect to overturn the holding in that case ... on the basis of a linguistic argument that was apparent, and which the Court did not embrace at the time.").

Furthermore, although courts may occasionally differ on how *Cipollone*'s framework should be applied to particular allegations against cigarette companies, there is nothing approaching judicial inconsistency or confusion that warrants a reexamination of *Cipollone*. *See* Pet. App. 22a-23a (collecting cases for the view that "courts have routinely (though not uniformly) concluded that the [Labeling Act] does not preempt fraudulent misrepresentation claims arising out of false statements made in advertising").

Finally, Philip Morris cannot plausibly suggest that *Cipollone* "has been found to be inconsistent

with the sense of justice." *Patterson*, 491 U.S. at 174 (internal quotations omitted). Since *Cipollone*, the United States has brought RICO claims against Philip Morris for engaging in a decades-long conspiracy. *See supra* pp. 6-8. That litigation has brought to light substantial evidence of Philip Morris's participation in a conspiracy to defraud the American public, including through light descriptors. Overruling statutory precedent to immunize such conduct from state-law liability would not promote any common-sense notion of "justice."

C. *Cipollone* And *Reilly* Correctly Interpreted The Labeling Act

Although Philip Morris has failed to justify its invitation to reexamine *Cipollone*, a reexamination would fortify, not subvert, the Court's holding.

1. Congress did not preempt state-law fraud claims

a. The text of § 1334(b) confirms this Court's conclusion in *Cipollone* and *Reilly* that the Labeling Act does not preempt respondents' state-law fraud claims. The most natural reading of § 1334(b) is that a general state-law duty not to deceive is beyond the provision's preemptive scope.

Section 1334(b) states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." Although the term "requirement" encompasses state statutory and common-law duties, *see Riegel*, 128 S. Ct. at 1008 ("[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties"), it is the *duty* — not a jury's

application of the duty — that is the relevant "requirement," *see Bates*, 544 U.S. at 445 ("A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.").

The grammatical structure of § 1334(b) compels that conclusion: the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed." *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972) ("Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote."); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (meaning of a statute is "mandated" by its "grammatical structure"). Maine's general prohibition on consumer fraud is not, by its terms, a "requirement ... based on smoking and health." Nor does it become such a requirement merely because a jury finds that a cigarette company has violated that general prohibition by making fraudulent representations that relate to "smoking and health."

Even if there were ambiguity in the text or grammatical structure of § 1334(b) — and there is none — this Court's interpretation of the preemption clause must be "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Because this Court decides preemption questions beginning with a "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985), preemption may be found only when "that was the clear and manifest purpose of Congress,"

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (internal quotations omitted). Ambiguities, in other words, are resolved against rather than in favor of preemption.

That presumption applies with full force here. Protecting the public against fraudulent business practices has long been a core focus of state consumer-protection law. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) ("Given the long history of state ... statutory remedies against ... unfair business practices, it is plain that this is an area traditionally regulated by the States.") (footnote omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (regulations "designed to prevent the deception of consumers" lies "well within the scope of California's police powers"). This Court has also recognized that States have "a substantial interest in protecting [their] citizens from misrepresentations that have caused them grievous harm." *Belknap, Inc. v. Hale*, 463 U.S. 491, 511 (1983).

Maine's prohibition against deceptive business practices is a prototypical exercise of generally applicable commercial law. This Court's "basic presumption against pre-emption," *Bates*, 544 U.S. at 449, accordingly precludes an expansive reading of § 1334(b). Had Congress intended to give cigarette companies preemptive dispensation from Maine's generally applicable rule prohibiting fraudulent business practices, "it surely would have expressed that intent more clearly." *Id.*

b. The history and purposes of the Labeling Act strengthen the conclusion that § 1334(b) does not preempt generally applicable state laws grounded in States' traditional police powers.

The Labeling Act's legislative history establishes that cigarette companies did not ask for, and did not receive, a cigarette-industry exemption from generally applicable state-law duties to refrain from false advertising. Congress adopted the Labeling Act in the wake of the substantial health concerns generated by the 1964 Surgeon General's Report and a fear by some that agencies and States would overreact, imposing draconian laws singling out cigarette companies. Members of the North Carolina delegation, for example, called for a preemption clause based on the need to prevent States from enacting laws that "single out cigarettes for special prohibitive treatment" and that give rise to "selective discrimination." *Cigarette Labeling and Advertising — 1969 (Part 1): Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 27 (1969) (statement of Rep. L.H. Fountain on behalf of North Carolina delegation). In 1969, the cigarette industry itself asked for "an appropriate preemption provision" so that "[c]igarette advertising [would] not be singled out for punitive regulation." *Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the S. Comm. on Commerce*, 91st Cong. 80 (1969) (statement of Joseph F. Cullman, Philip Morris Chairman, on behalf of eight major cigarette companies). Philip Morris's chairman stressed that "[c]igarette advertising should not be the target of discriminatory regulation." *Id.*

The legislative history contains no evidence that cigarette companies sought, or that Congress considered creating, a cigarette-company exemption from generally applicable state laws. "[T]hat Congress did not even *consider* the issue readily disposes of any argument that Congress unmistakably intended" to

create such an exemption. *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996) (plurality) (it would have been "spectacularly odd" for Congress to create broad immunity from "traditional common-law remedies" without "even ... hint[ing]" at that outcome). The evidence in fact suggests that Congress was careful to *avoid* the very result that Philip Morris seeks. The 1969 Senate Report (at 12) explains that the Labeling Act's preemption provision was "narrowly phrased" to ensure that it "would in no way affect the power of any State ... with respect to ... police regulations."

Furthermore, even if § 1334(b) could be construed to reach some duties of general applicability (such as a duty to warn or not to neutralize warning labels), nothing in the Labeling Act's text, history, or purposes evidences a congressional intent to give cigarette companies an immunity from state-law duties relating to fraudulent advertising. Although Congress prescribed the appropriate warning to be provided on cigarette packages, it did nothing in either the 1965 Act or the 1969 Act to address or to regulate print and non-broadcast advertising or promotion by cigarette companies.[4] Absent meaningful federal regulation of advertising or promotion, it would have been odd for Congress to have extinguished all state-law fraud claims unrelated to warning labels, leaving cigarette companies alone effectively unregulated in

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[4] Although Congress banned electronic advertising after 1971, *see* 15 U.S.C. § 1335, Congress anticipated that cigarette companies would shift their advertising resources to print advertising. *See* 1969 Senate Report at 11. (Those concerns were well-founded. *See* JA585a-586a.). Congress did nothing in the 1969 Act to regulate deceptive claims in such advertising.

this area. *Cf. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503-04 (1988). Nothing in the Labeling Act suggests that Congress intended to endow cigarette companies — and only cigarette companies — with an effective "license to lie" to consumers. *Forster*, 437 N.W.2d at 662.

2. The Labeling Act cannot sensibly be read to invest in the FTC exclusive authority to police deceptive advertising

Philip Morris acknowledges that "Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health." Br. 28. It insists, however, that Congress intended to preempt generally applicable state-law remedies for deceptive business practices and to "allocate[] responsibility for policing health-related claims in cigarette advertising and promotion to the FTC," and to the FTC alone. *Id.* That hypothesis is fundamentally mistaken.

First, a conclusion that Congress intended to give the FTC exclusive authority to police deceptive advertising cannot be reconciled with the uniquely interdependent relationship between the FTC's regulatory scheme and private state-law remedies. State unfair- and deceptive-practices statutes (such as Maine's) serve a critical role as adjuncts to the FTC's enforcement mechanisms. Beginning in 1966 and owing to the FTC's "crucial and probably inherent limitations," the FTC has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement, "[a]ll fifty states and the District of Columbia have enacted at least one statute ... aimed at preventing

consumer deception." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997) ("NCLC-*UDAP*"). These state laws "incorporat[e] the FTC Act concepts of deception" and are "important" in redressing "marketplace misconduct and abuse of consumers." *Id.* "[T]he FTC urged states to adopt their own little-FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 16 (2005).

Philip Morris says (at 28-29) that it is "not unusual" for Congress to "provid[e] a single federal agency with the authority to oversee an industry's advertising practices." Whatever the usual practice may be, however, the relationship between the FTC and state law is distinctive. The FTC envisions an "overlapping" enforcement regime to remedy "problems in the marketplace" that "exceed the [FTC's] enforcement capabilities." *United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003). This unique "history of co-existence between the FTC Act and other statutes, both state and federal, directed at fraudulent ... advertising" shows why the Labeling Act cannot sensibly be read to vest exclusive authority in the FTC to police fraud in cigarette advertising. *Id.* at 79; *see also* Stephanie W. Kanwit, *Federal Trade Commission* § 26:3, at 26-12 to 26-13 (2006) (noting that FTC "works closely" with States "to coordinate enforcement").

Second, it is implausible that Congress, in 1970, intended to invest in the FTC exclusive authority to superintend all deceptive advertising by cigarette companies. Even today, the FTC, though "one of the

smallest ... administrative agencies ever created," Kanwit § 1:1, at 1-1, is charged with enforcing "an enormous number of laws," *id.* § 1:2, at 1-3; 16 C.F.R. § 0.4 (listing statutes); *see also* Kanwit § 22:1, at 22-3 ("the breadth" of FTC's mandate to police "advertising practices" is "almost unmanageable"). When Congress enacted the 1969 Act, the FTC faced far greater limitations than it does today.

Congress did not approve FTC rulemaking authority until six years after the 1969 Act. *See* Kanwit § 3.9, at 3-23. Prior to 1962, and "[f]or the first half-century of its operation, the FTC limited its method of enforcement ... to the adjudicatory process" and repeatedly disclaimed "power to issue substantive rules." Thomas M. Dyer & James B. Ellis, *The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. Wash. L. Rev. 330, 332 (1972). Although the agency reversed course in 1962 and asserted authority to promulgate rules, that "assertion" was "the subject of controversy both within and without the [FTC]," and there was "virtual unanimity" among legal commentators that such rulemaking authority "d[id] not exist." *Id.* at 333-34.

Doubts about the FTC's authority to adopt industry-wide rules were aired in debates over the 1969 Act,[5] and the Act's text makes clear that Congress did not intend to settle the debate. *See* 1969 Act § 2, 84 Stat. 89 (adding new 1965 Act § 7(c)) ("[n]othing in this Act shall be construed to affirm or deny the

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[5] *See, e.g., Cigarette Labeling and Advertising: Hearings Before the S. Comm. on Commerce*, 89th Cong. 252 (1965) (statement of Bowman Gray, R.J. Reynolds Tobacco Co. Chairman) (arguing that FTC "does not have the authority to issue this trade regulation rule" and companies would "oppose [the rule] in the courts").

[FTC's] holding that it has the authority to issue trade regulation rules"). Congress's failure to affirm the FTC's authority in the 1969 Act "increase[d] uncertainty surrounding the [FTC's] claimed authority." Dyer & Ellis, 41 Geo. Wash. L. Rev. at 344.

At a time when the FTC lacked settled authority to regulate on an industry-wide basis, it is exceedingly unlikely that Congress would have intended to displace long-established and generally applicable state-law remedies and to assign exclusively to the FTC the substantial task of overseeing deceptive advertising practices by the cigarette industry. Congress could not plausibly have anticipated that the FTC, in the exercise of such exclusive authority, would police false advertising solely through its complaint process. In 1970, FTC cease-and-desist orders were universally recognized as ineffective. "Prior to 1975, the [FTC] could only recover civil penalties from a ... corporation which violated a cease and desist order that had been previously issued against it" — meaning that parties had "two bites at the apple" and that cease-and-desist orders could not be used to police non-parties. Earl W. Kintner & Christopher Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 Mercer L. Rev. 651, 681 (1975) (internal quotations omitted).

Nor could the FTC seek preliminary injunctions. *See* Kanwit § 3:8, at 3-21. It was thus powerless to halt false advertising until after a final cease-and-desist order, and "by the time the [FTC's] complaint and hearing processes [would] grind through to completion, an advertiser [could] obtain full use and benefit from a false ad, and thereafter happily settle for a cease and desist order." Ira M. Millstein, *The*

Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 493 (1964). Even then, cease-and-desist orders were not self-enforcing but required resort to a federal district court for enforcement. *See* 15 U.S.C. § 57b. Moreover, the FTC lacked authority to represent itself in federal court and was forced to rely on the Department of Justice to bring its enforcement actions. *See* Kanwit § 3:8, at 3-21 to 3-22. The FTC also lacked statutory authority "to award damages to those victimized by false advertising." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 999 (D.C. Cir. 1973); *see* Kanwit § 3.9, at 3-25. It was precisely because of these crippling limitations that Congress overhauled the FTC's authority in 1975. *See American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985) (Congress understood FTC was "hampered as an effective force" because it had to "rely solely on the cease and desist order procedure for enforcement") (internal quotations omitted).[6]

Accordingly, in enacting the 1969 Act — a statute designed to combat the profound public health consequences of smoking — Congress evidenced no intent to invest exclusive authority in the FTC to police false advertising and to preempt state-law fraud remedies that serve important compensatory and deterrence goals.[7] And it is implausible to suppose

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[6] Congress recognized "the sole enforcement weapon available to the FTC to police ... consumer frauds" was the "cease and desist order," but such orders had been "decried" as "inadequa[te]" for "decade[s]." S. Rep. No. 93-151, at 9 (1973).

[7] *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It would have been perfectly rational for Congress not to preempt common-law claims, which — unlike most administrative and legislative regulations — necessarily perform an important

that Congress intended to hand over the task of policing deceptive advertising by cigarette companies (an industry that Congress understood posed a grave threat to the public health) to the FTC exclusively at a time when the FTC's authority and effectiveness were universally recognized as deficient.

3. Philip Morris's expansive reading of the preemption provision is untenable

a. In defense of its broad reading of the Labeling Act's preemptive scope, Philip Morris first points (at 29) to the Act's goal, set forth in § 1331(2), of preventing "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." But Congress's concern with uniformity was subordinate to its goal of ensuring that consumers receive "adequate information" regarding smoking and health. *See* 1965 House Report at 1 ("principal purpose" of Act is to ensure that consumers are adequately informed); *Lohr*, 518 U.S. at 490-91 (plurality) ("safety" was "primary issue motivating the [Medical Device Amendments'] enactment"; protecting the industry was a secondary concern). State-law fraud claims further that paramount aim by deterring false representations in cigarette advertising. *Cf. Bates*, 544 U.S. at 451 (holding that "[p]rivate remedies ... would seem to aid, rather than hinder," federal law).[8]

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remedial role in compensating accident victims."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

[8] Congress understood that pursuit of the Labeling Act's primary goal of promoting dissemination of accurate information might come at a cost to the statute's secondary goals. *See* 15 U.S.C. § 1331(2) ("national economy" should be "protected *to the maximum extent consistent with*" policies of the Act) (emphasis added); *see also Silkwood*, 464 U.S. at 256 ("It may be that the award of damages based on the state law of negligence ... is

Moreover, Philip Morris substantially overstates the potential for disuniformity arising from the state-law claims at issue. *Cipollone*'s statement that "state-law proscriptions on intentional fraud rely only on a single, uniform standard" of "falsity," 505 U.S. at 529, well captures the category of state deceptive-practices statutes at issue here. These statutes share unique similarities because most were "greatly influenced by the Unfair Trade Practices and Consumer Protection Act of 1967, model legislation developed by staff attorneys at the FTC and a Committee of the Council of State Governments." Lovett, 46 Tul. L. Rev. at 750; *see* Lawrence R. Fullerton & Jane E. Larson, *Using FTC Act Precedents in State Consumer Protection Cases*, 3-FALL Antitrust 24, 25 (1988) ("[c]ourts interpreting state UDAP statutes have relied extensively on precedents under the FTC Act for legal standards for ... 'deception'"). Because these statutes (including Maine's) incorporate federal standards, the FTC has the practical ability to shape and influence their application, thereby contributing to uniformity.[9]

Philip Morris points to no actual evidence of disuniformity or consumer confusion. Instead, it simply asserts that "[a]llowing respondents' suit to proceed would generate consumer confusion about tar and nicotine claims in cigarette advertisements and

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regulatory ... , but that regulatory consequence was something that Congress was quite willing to accept.").

[9] *See* NCLC-*UDAP* at 131 ("[m]ost state UDAP statues are modeled after the FTC Act ... and, because of this parentage, ... declare that it is the intent of the legislature that ... courts will be guided by the interpretations given by the [FTC]"; consequently, "courts show great deference to FTC decisions") (internal quotations omitted).

obliterate the national regulatory uniformity that the Labeling Act was designed to establish." Br. 29-30. But state-law fraud claims against cigarette companies have co-existed with the Labeling Act for nearly 40 years, with no evidence of the serious harms that Philip Morris imagines. *See Bates*, 544 U.S. at 451-52 (noting that Court has "been pointed to no evidence that such tort suits led to a 'crazy-quilt' of [statutory] standards or otherwise created any real hardship for manufacturers").

More fundamentally, in the unlikely event that state-law fraud claims were to generate consumer confusion or contribute to disuniformity without countervailing public benefit, the FTC would be equipped to preempt future claims by adopting binding, industry-wide rules regulating the use of light descriptors or cigarette advertising more broadly. The FTC has "legal authority within ordinary administrative constraints to promulgate agency rules and to determine the pre-emptive effect of those rules in light of the agency's special understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Bates*, 544 U.S. at 454 (Breyer, J., concurring) (internal quotations omitted); *Sprietsma*, 537 U.S. at 65.[10] In the absence of such preemptive rules, however, state-law fraud claims remain available to supplement FTC enforcement and to fulfill the remedial function of compensating victims of fraud. *See Sprietsma*, 537 U.S. at 70 ("[a]bsent a contrary decision by the Coast

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[10] *See* Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 240 (1976) (FTC may preempt "state ... activities" that are "counter-productive"); *Katharine Gibbs Sch. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Guard, the concern with uniformity does not justify the displacement of state common-law remedies").[11]

b. Philip Morris's arguments (at 25-29) regarding the Labeling Act's "structure" are equally flawed.

Philip Morris first points (at 25-26) to Congress's intent to establish a "comprehensive" federal program. But Congress's "'comprehensive program' was" in fact "directed at the relatively narrow specific issue of regulation" of warnings proposed by the FTC on packages. *Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968). And the statutory reference to "comprehensive" "is meaningful only after [a court] discover[s] what subject matter is comprehended." *Id.* at 1090 n.26. As explained, Congress did not undertake in the 1965 Act or the 1969 Act comprehensively to regulate or police deceptive cigarette advertising. The singular focus of each version of the Act was on the warning label on cigarette packages. *See supra* pp. 2-4. The Labeling Act's reference to "comprehensive" accordingly does not establish Congress's intent to preempt generally applicable state-law fraud claims relating to statements in advertising and promotion unrelated to warnings.

Philip Morris also suggests (at 26-27) that the absence of a state-law savings clause is evidence of an intent to preempt. In light of the presumption against preemption, however, the absence of a provision expressly preempting state-law fraud claims is

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[11] The FTC did not conclude that state-law damages actions are preempted in a 1988 letter to a member of Congress, as Philip Morris suggests (at 30). A previous letter in that exchange is clear that the FTC was discussing only preemption of positive enactments, not statutory or common-law "liability" over which the FTC had no "jurisdiction." Ex. 203, at 6 (attached to Philip Morris's Summ. J. Mot. (D. Me. filed Oct. 3, 2005)).

far more probative of Congress's intent than is the absence of a state-law savings clause.[12] Indeed, the most plausible explanation for the lack of such a savings clause is that Congress did not believe that § 1334(b) could reasonably be understood to preempt generally applicable state-law duties.

c. Finally, Philip Morris argues that it would be irrational to permit "an exception to the Labeling Act's preemptive reach for the application of the general duty not to deceive." Br. 36. In support of that claim, Philip Morris relies most prominently on this Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). But *Morales*, which was decided before *Cipollone* and *Reilly*, does not bear on the proper interpretation of the Labeling Act. The statute at issue in that case — the Airline Deregulation Act of 1978 ("ADA") — expressly preempted the States from "enact[ing] or enforc[ing] any law ... relating to rates, routes, or services of any air carrier." *See id.* at 383. The decision in *Morales* turned on the breadth of the ADA's phrase "relating to." *See id.* at 384 (noting that the term "relating to" has a "broad scope," has an "expansive sweep," and is "conspicuous for its breadth") (internal quotations omitted). "[T]he sweep of the 'relating to' language" led the Court to conclude that the provision could not be read to preempt "only state laws specifically addressed to the airline industry." *Id.* at 386.

Section 1334(b) lacks the breadth of the ADA's preemption provision. It reaches only those state-law requirements that are "based on smoking and

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[12] Congress certainly knows how to craft provisions that expressly preempt state-law damages actions. *See, e.g.*, 12 U.S.C. § 2259; 17 U.S.C. § 301(a); 25 U.S.C. §§ 1723(a)(1), 1753(d); 29 U.S.C. § 1144(a), (c)(1).

health," not laws that when "enforce[d] ... relat[e] to" smoking and health. A generally applicable state-law prohibition against deceptive practices is not, in any normal sense of the phrase, "based on" smoking and health. *See Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201, 2212 (2007) ("'based on' indicates a but-for causal relationship and thus a necessary logical condition"). That a jury might apply the prohibition in a case "relating to" smoking or health does not mean that the general prohibition itself is "based on" smoking or health.

Congress's dissimilar choice of language in these two preemption provisions is understandable in light of the two statutes' differing purposes. In the ADA, Congress "determin[ed] that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality ... of air transportation services.'" *Morales*, 504 U.S. at 378 (first alteration added). It chose expansive preemptive language "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* In the Labeling Act, by contrast, the cigarette companies sought protection only from discriminatory state requirements targeted specifically at cigarette marketing. They did not seek, and Congress had no need to enact, a cigarette-industry exemption from generally applicable consumer-protection laws. *See Reilly*, 533 U.S. at 551-52.[13]

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[13] *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) — also an ADA case — followed *Morales*'s lead and is similarly inapposite. Furthermore, subsequent to *Morales*, Congress ratified this Court's reading of the ADA, *see Wolens*, 513 U.S. at 246 (O'Connor, J., concurring in judgment in part and dissenting in part), which renders ADA decisions an even less reliable guide to interpretation of the Labeling Act. This Court's decision in

This Court's decision in *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008), moreover, casts substantial doubt on Philip Morris's use of *Morales*. In *Rowe*, this Court held that a state law regulating delivery services was preempted by a federal statute that regulates the motor carrier industry and that "borrowed" the ADA's "relating to" preemption language. *Id.* at 993. In reaching that conclusion, the Court emphasized that it was *not* holding that the federal statute "generally pre-empts state public health regulation: for instance, state regulation that broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public." *Id.* at 997. The law at issue regulating the delivery services, however, was "not general" and did not "affect truckers solely in their capacity as members of the general public"; rather, it was "aim[ed] directly at the carriage of goods." *Id.* at 997-98. *Rowe* thus supports the common-sense conclusion that even the most inclusive preemption language may leave room for state laws of general applicability that do not target (or "aim directly" at) a particular industry.

II. RESPONDENTS' FRAUD CLAIMS ARE NOT IMPLIEDLY PREEMPTED

The FTC has never made a regulatory decision to authorize or encourage the use of light descriptors and has never required cigarette companies to use the Cambridge Method or to disclose tar and nicotine yields. Philip Morris nonetheless maintains that respondents' state-law fraud claims are impliedly pre-

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Riegel also involved a broad "relat[ing] to" provision in a statute whose purposes and history differ significantly from those of the Labeling Act. 128 S. Ct. at 1003.

empted because, "if allowed to proceed, they would present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting competition among tobacco companies in the development of low-tar cigarettes." Br. 45. That argument has no merit.

A. The FTC Has Neither Authorized Nor Encouraged The Use Of Light Descriptors

1. The FTC has broad authority to adopt regulations "defin[ing] with specificity acts or practices which are unfair or deceptive." 15 U.S.C. § 57a(a)(1)(B). In exercising that authority, the FTC has issued only a limited number of trade regulation rules carrying the force of law. *See* 16 C.F.R. Pts. 408-460. And not a single one of those pages concerns cigarettes. *See id.* Pt. 408 ("Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking") (left blank). Philip Morris's implied preemption defense thus falters at the threshold because the FTC has neither regulated nor affirmatively encouraged Philip Morris's use of light descriptors.

That conclusion is evident from the FTC's 1997 request for public comments regarding regulation of light descriptors. *See* JA267a-295a. In that notice, the FTC stated that "[c]igarette manufacturers use a number of descriptive terms ... in advertising and labeling information about their cigarettes," that "[t]here are no official definitions for these terms," and that the Ad Hoc Committee of the President's Cancer Panel had recommended that such descriptors be regulated. JA291a-292a. The FTC invited public comment on whether "there [is] a need for official guidance with respect to the terms used in

marketing lower rated cigarettes? If yes, why? If no, why not?" JA292a; *see also* JA462a (testimony of FTC Deputy Director of Bureau of Consumer Protection Peeler) ("The FTC does not have a view on the use of descriptors ... on cigarette packages or in cigarette advertising."); *Philip Morris*, 449 F. Supp. 2d at 925 n.88 (finding, based on FTC testimony, that "FTC does not impose, regulate, or require [the use of descriptors]"; "[h]ow those terms are applied, and on which brands, is entirely up to the tobacco companies") (internal quotations and alterations omitted). The FTC's request for comment, coupled with its subsequent failure to complete the proceeding, refutes Philip Morris's assertion (at 47) that the FTC has "authorized the use of tar and nicotine descriptors in cigarette advertising as a shorthand means of communicating tar and nicotine information to consumers."

Even more telling is the prior position of cigarette companies themselves. Most major cigarette companies, including Philip Morris, filed joint comments in response to the FTC's 1997 notice, stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Philip Morris 1998 FTC Comments at 94. By 2002, Philip Morris had changed its mind: it urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." JA1083a-1084a. The FTC's proposed regulation of light descriptors in 1997, the companies' position that there was no need for such regulation, Philip Morris's subsequent request for regulation, and the FTC's failure to adopt any regulations on the subject are each impossible to square with Philip Morris's current contention that the FTC

has specifically authorized or encouraged cigarette companies to use light descriptors.

Although the absence of FTC authorization of light descriptors is manifest from that regulatory history, the Solicitor General recently confirmed — consistent with sworn testimony by the FTC — that the FTC has not "exercised comprehensive control over [Philip Morris's] advertising of light cigarettes." U.S. *Amicus* Br. at 7, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Dec. 15, 2006) ("U.S. *Watson* Cert. Br."). "The FTC has never promulgated definitions of terms such as 'light' or 'low tar.'" *Id.* at 4; *see* U.S. *Amicus* Br. at 3-5, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Feb. 26, 2007) ("U.S. *Watson* Merits Br.").[14]

This case is therefore the opposite of *Geier*. In that case, the Department of Transportation had adopted formal rules governing automobile safety and had "consistently over time" warned of the "interference" that state-law claims would pose to federal regulatory objectives regarding automobile safety. 529 U.S. at 883. The Department further told the Court "through the Solicitor General" that the regulatory history evidenced the agency's "policy judgment" about how best to promote automobile safety. *Id.* at 881. Here, the Solicitor General has explained that the FTC has never required, authorized, or promoted the use of light descriptors, and certainly not when Philip Morris knew and intended that use of descriptors would convey a false message. Respondents'

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[14] The Solicitor General also rejected the claim that the marketing of light cigarettes was undertaken by Philip Morris to further federal policy: "[i]n marketing its cigarettes as 'light' ... , [Philip Morris] acted on its own." U.S. *Watson* Cert. Br. 8-9; *see* U.S. *Watson* Merits Br. 18.

state-law fraud claims cannot "impede the FTC's low-tar policy," as Philip Morris argues (at 46), when the FTC's official position is that no such policy exists. *See Sprietsma*, 537 U.S. at 68.

2. Philip Morris nevertheless insists (at 11) that "[t]he FTC has repeatedly endorsed the use of descriptors," citing as evidence (at 11-13) two FTC consent orders with other cigarette companies and a 1967 letter from the FTC to a broadcasting trade association. Those sources offer no support for Philip Morris's assertion.

a. The 1971 and 1995 consent orders do not constitute industry-wide authorization to use light descriptors. An FTC consent order has no legal effect on non-parties and does not establish any generally applicable agency policy. That is clear from the statutory language, this Court's precedents, and the FTC's consistent administrative practice.

First, Congress specified in the FTC Act that the legal effect of FTC consent orders is limited to those who are party to the decrees. Before 1994, the FTC Act provided that, "[i]f the [FTC] determines ... that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the [FTC] may commence a civil action to obtain a civil penalty ... against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the [FTC] determines ... that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then

the [FTC] may commence a civil action to obtain a civil penalty ... against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Congress thereby determined that FTC consent orders are a unique category of agency orders that may not be used to establish industry-wide standards.[15]

That conclusion is strengthened by 15 U.S.C. § 57b(e), which provides that FTC enforcement remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." As the court below correctly held, that provision reflects Congress's intent that FTC enforcement should not displace parallel state-law remedies. *See* Pet. App. 47a-50a. It follows that an FTC consent order, which cuts short the enforcement process, cannot be viewed as preempting state-law actions against non-parties.

Second, this Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees in similar cases in which divestiture was not required. This Court rejected the argument, reasoning that "the circumstances surrounding such negotiated agreements are

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[15] The legislative history confirms that conclusion. The House Report stated that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.*

so different that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12. The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe harbor for non-parties. *See United States v. Armour & Co.*, 402 U.S. 673, 680-82 (1971) ("[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms" and "cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve").[16]

Third, the FTC has consistently held that consent orders are not "controlling case precedent." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976). That is so because "[consent] orders are negotiated by the parties" and "are not based on any finding of violation, a necessary predicate to an adjudicated

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[16] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959), does not, as Philip Morris's *amici* contend, point to a different result. *See* Ex-FTC Staff Br. 8. The Court there found support for its statutory interpretation in the FTC's "consistent administrative construction" of the Act, exemplified by *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954), and reinforced by more than a hundred subsequent cease-and-desist orders based on that case. 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending the *Ed Hamilton Furs* proceeding was, in substance, a cease-and-desist order. The defendant stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order ... shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language does not appear in the 1971 and 1995 consent orders.

order." *Chrysler Corp.*, 87 F.T.C. at 742 n.12; *see In re Trans Union Corp.*, 118 F.T.C. 821, 864 n.18 (ALJ decision 1993, affirmed as modified by full Commission 1994) (a "consent agreement [with one party] is binding only between the [FTC] and [that party]").[17] Indeed, when the FTC intends to use the consent process to achieve industry-wide results, it obtains separate decrees with all cigarette companies. *See In re Lorillard*, 80 F.T.C. 455 (1972).

Furthermore, even if the FTC consent orders were viewed as creating an industry-wide safe harbor, Philip Morris could not seek shelter in that harbor. The 1971 consent order is clear that certain descriptors may be used only when "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields. JA698a.[18] Respondents' claims

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[17] The FTC's position on the legal effect of its consent orders is longstanding. *See, e.g., In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("[A] consent order entered into by the [FTC] is not an adjudication on the merits of a matter and is not binding. ... The courts and the [FTC] have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties[.]"); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that a consent order entered under agreement of the parties "is not a precedent in other cases for any purpose").

[18] Indeed, the 1971 consent order's prohibition on the use of low-tar representations absent disclosure of yields also undermines Philip Morris's assertion that descriptors, standing alone, are a "shorthand" for Cambridge Method results. The FTC's determination that American Brands could not use descriptors

are based in part on Philip Morris's use of descriptors on cigarette packages. *See* JA28a. Philip Morris has never included yields on its cigarette packages.[19] And, regardless of what the consent orders authorize, they certainly do not entitle Philip Morris to make intentionally false representations to the public. *See* JA32a.

b. The FTC's 1967 letter to the National Association of Broadcasters similarly fails to establish that the agency made a regulatory choice to authorize industry-wide use of light descriptors. That letter did not discuss, let alone purport to define or encourage, cigarette companies' use of light descriptors. The letter stated only that the FTC would not at that time challenge factual statements of the "tar and nicotine content of cigarettes." JA368a. The letter was clear, however, that, "no matter how relatively low [a cigarette's] tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer.'" JA369a. In addition, the letter stated that the basis for any low-tar comparison must be "fully and fairly stated." *Id.* Whatever protective umbrella the 1967 letter might be thought to provide, it cannot help Philip Morris because the company ignored both of those stated limitations: Philip Morris falsely represented to the public that its light cigarettes were safer, and it neither fully nor fairly stated the basis for its low-tar comparison — indeed, it has never

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without test yields establishes that the FTC did not view descriptors as the same as yields.

[19] *See, e.g., Aspinall v. Philip Morris Cos.*, No. Civ. A. 98-6002, 2006 WL 2971490, at *5 (Mass. Super. Ct. Aug. 9, 2006) ("[I]t is undisputed that the tar and nicotine yields have never been included on Marlboro light packages.").

included tar and nicotine yields on its cigarette packages.

In addition, even if the 1967 letter could be read to mean that the FTC would not challenge the use of descriptors, nothing in the regulatory history suggests that the FTC's non-action was tied to an affirmative regulatory program of *promoting* the use of descriptors in advertising. It defies common sense to suggest that a decision not to pursue remedies against certain conduct is tantamount to encouraging that conduct. The government has rejected such an interpretation of the regulatory history. *See* U.S. *Watson* Merits Br. 21 ("the FTC has [not] requested ... tobacco companies to ... advertise their cigarettes using [light] descriptors"). Thus, setting aside that the 1967 letter has nothing to do with descriptors — indeed, the letter predates petitioners' introduction of light cigarettes by four years — the letter does not embody the type of "affirmative policy judgment" to encourage the use of descriptors that would support implied preemption. *Sprietsma*, 537 U.S. at 67 (internal quotations omitted); *see id.* ("intentional and carefully considered" decision not to regulate "does not convey an 'authoritative' message of a federal policy").

Finally, Philip Morris's reliance on the letter is misplaced because it is not "law" that would form the basis for preemption. *See* U.S. Const. art. VI, cl. 2 ("the *Laws* of the United States ... shall be the supreme Law of the Land") (emphasis added). To be sure, "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Thus, in

certain circumstances, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws." *Id.* at 63-64 (internal quotations omitted).

For an agency rule to have the "force and effect of law," however, it typically must be adopted in compliance with the rulemaking requirements of the Administrative Procedure Act ("APA"). *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96, 301 (1979) (internal quotations omitted). The standard is particularly apt with respect to the FTC. When Congress granted the FTC rulemaking authority in 1975, it was "careful[]" to include "procedural protections" above and beyond those required by the APA to prevent broad disruption of state law. Verkuil, 1976 Duke L.J. at 247; *see* 15 U.S.C. § 57a(b)-(d). Because the 1967 letter does not come close to reaching the degree of formality achieved through rulemaking (or adjudication) — and, indeed, comes from a time when the FTC's rulemaking authority was in serious doubt — the letter cannot support broad federal preemption of state law.[20]

B. The FTC Has Not Required The Use Of The Cambridge Method Or The Disclosure Of Tar And Nicotine Yields

Philip Morris also says that the FTC has "required tobacco companies to disclose tar and nicotine yields" based on the Cambridge Method. Br. 47. In fact,

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[20] Even had the FTC intended the letter to provide industry-wide guidance, formal FTC industry guidance "does *not* have the force or effect of law and is not legally binding on the [FTC] or on the public in an enforcement action" and thus could not have had preemptive effect. FTC, *Operating Manual*, Ch. 8, § 3.2 *available at* http://www.ftc.gov/foia/ch08industryguidance.pdf.

the FTC has never required cigarette companies to use the Cambridge Method or to disclose tar and nicotine yields. *See* JA203a ("[n]o [FTC] rule or order requires the cigarette manufacturers to disclose" tar and nicotine ratings). Cigarette companies disclosed those yields pursuant to a *voluntary* 1970 agreement among the companies themselves that had nothing to do with light descriptors. The FTC was not a party to that agreement, and it lacks the legal authority to enforce it. *See* JA442a.

The D.C. Circuit's decision in *Brown & Williamson* confirms that the FTC could not have required the companies to use the Cambridge Method. At issue was a district court injunction requiring that Brown & Williamson, in its marketing of light cigarettes, "justify the advertisement of results from a different system of testing which it considers superior to the FTC system." 778 F.2d at 44. The court invalidated that provision of the injunction, reasoning that, "[b]ecause the FTC has not adopted its system of testing pursuant to a *Trade Regulation Rule* under section 18 of the FTC Act, one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* (emphasis added, citation omitted).

Respondents' position and the decision below accord with positions taken by the Solicitor General in *Watson*: "[t]he FTC has not required [Philip Morris] to use the Cambridge Method to determine tar and nicotine levels or to report the results of those tests in its advertising." U.S. *Watson* Cert. Br. 9. The Solicitor General also rejected Philip Morris's reliance on the 1970 voluntary agreement, stating that it is improper to "treat[] the [cigarette] companies'

agreement as if it were the equivalent of an FTC regulation." *Id.*[21]

More fundamentally, even if the FTC could be understood to have required such disclosures or use of the Cambridge Method, that would have no bearing on this case. Respondents allege that Philip Morris made "[f]alse[]" claims that certain of its cigarettes are "'light' and/or deliver[] lowered tar and nicotine." JA32a; *see* JA31a. Respondents challenge descriptors, not the Cambridge Method or *factual* statements of tar and nicotine yields based on that method. Thus, Philip Morris's implied preemption theory misses the central claim of respondents' case.

* * *

In *Cipollone*, this Court held that Congress did not intend to preempt state-law actions for frauds committed by cigarette companies in the marketing of cigarettes. In asking this Court to overrule *Cipollone*, Philip Morris asks for immunity from longstanding state deceptive-practices statutes. Given the well-documented deceptions by cigarette companies over many decades to lull consumers into smoking so-called "light" cigarettes notwithstanding the health risks, and given the absence of legally binding FTC actions that would displace state-law damages

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[21] The views expressed by former FTC employees in an *amicus brief* on behalf of Philip Morris should be accorded little weight in light of the FTC's official views of its regulatory history in sworn testimony. *See Geier*, 529 U.S. at 883. This Court recently rejected the arguments made in a similar brief by many of the same former FTC employees, holding that "[n]othing" in the evidence cited by the ex-FTC employees supported their assertion that the FTC had "delegated testing responsibility" to cigarette companies. *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2310 (2007).

actions, respondents' claims to recompense consumers for the economic consequences of Philip Morris's fraud should be permitted to proceed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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